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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EFREN ALVAREZ, Defendant and Appellant.	B298813 (Los Angeles County Super. Ct. No. A713630)

APPEAL from an order of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

Marta I. Stanton, by appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General , Susan Sullivan Pithey, Assistant Attorney General, Idan Ivri and Blake Armstrong, Deputy Attorneys General, for Plaintiff and Respondent.

Efren Alvarez appeals from a summary denial of his petition seeking vacation of his murder conviction and resentencing pursuant to Penal Code section 1170.95.[1] Alvarez contends the trial court erred in determining he was ineligible for resentencing. Finding no error, we affirm.

BACKGROUND

Alvarez attended a party in May 1989 at which he fired two shots into one man's upper torso, killing him. Alvarez pled no contest to second degree murder and admitted having personally used a firearm in the commission of the crime. (§§ 187, subd. (a), 12022.5, subd. (a).)

In 2019, Alvarez filed a form petition under newly enacted Senate Bill No. 1437 (SB 1437) and section 1170.95 for vacation of his conviction and resentencing. He checked pre-printed boxes stating, in essence, that he had been charged with a murder which allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. Alvarez stated he was convicted of first- or second-degree murder pursuant to one of those theories, but could not now be so convicted based on 2019 amendments to sections 188 and 189 (i.e., SB 1437, and § 1170.95). Alvarez requested that counsel be appointed to represent him.

Alvarez's petition was summarily denied. In relevant part, the trial court's ruling states: "This matter was settled by way of plea

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1 Statutory references are to the Penal Code.

disposition; therefore, no jury trial occurred. As such, the court has reviewed the probation report and the transcript from the date of [Alvarez's] plea, July 24, 1990. The facts from the probation report indicate that [Alvarez] and fellow gang members attended a party . . . . [Alvarez], along with . . . other gang members began assaulting other party goers. [Alvarez] then fired two shots into the victim's upper torso, killing him. The plea transcript, along with other court records, show that [Alvarez] pled no contest to second degree murder (Penal Code § 187(a)), and admitted that he ***personally used a firearm*** during the commission of the murder (Penal Code § 12022.5(a)).

"Senate Bill 1437, enumerated in [section 1170.95], eliminated both felony murder and the 'natural and probable consequences' theory of murder in California. Several exceptions exist that exclude a defendant from murder liability, if the prosecution was based on either of those theories of liability. Those exceptions [include]: 1. Defendant is the actual killer . . . . In this case, [Alvarez] pled no contest to second degree murder (Penal Code § 187(a)), and admitted that he ***personally used a firearm*** during the commission of the murder (Penal Code § 12022.5(a)). As such, he is the actual killer and is ineligible for relief."[2]

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[2] The record contains only the information and a minute order holding appellant to answer. It does not include other documents on which the trial court relied in denying the petition (i.e., the plea transcript, probation report or "other court records"). The absence of these records does not preclude disposition of this matter. Alvarez does not dispute that the trial court relied on the records it recited. He has not requested augmentation of the appellate

DISCUSSION

Alvarez contends the trial court erred in summarily denying his petition for resentencing because he alleged a prima facie case for relief, and the matter should be remanded with directions to the court to appoint counsel.

Statutory Principles and the Standard of Review

"[SB 1437] was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, . . . to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant of the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) [SB 1437] achieves these goals by amending section 188 to require that a principal act with express or implied malice and by amending section 189 to state that a person can only be liable for felony murder if (1) the 'person was the actual killer'; (2) the person was an aider or abettor in the commission of murder in the first degree; or (3) the 'person was a major participant in the underling felony and acted with reckless indifference to human life.' (§ 189, subd. (e), as amended by Stats. 2018, ch. 1015, §§ 2, 3.)" (*People v. Cornelius* (2020) 44 Cal.App.5th 54, 57, review granted March 18, 2020, No. S260410 (*Cornelius*).)

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record to include any additional or contrary evidence, nor does he deny he was convicted of murder with the personal use of a firearm.

"[SB 1437] added section 1170.95, which allows a 'person convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts.' (§ 1170.95, subd. (a).) . . . [A]ll three of the following conditions must be met: '(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first or second degree murder . . . . [¶] (3) The petitioner could not [now] be convicted of first or second degree murder because of changes to [s]ection 188 or 189.' (*Ibid*.) The petition shall include a declaration stating that 'he or she is eligible for relief under this section' based on the three requirements of subdivision (a). (§ 1170.95, subd. (b)(1).)" (*Cornelius, supra,* 44 Cal.App.5th at p. 57.)

A petition for resentencing must include the superior court case number and year of conviction, and whether there is a request for the appointment of counsel. (§ 1170.95, subd. (b)(1).) If the petition contains the requisite information, the trial court proceeds with its analysis. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 327, review granted March 18, 2020, No. S260493 (*Verdugo*).)

First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) As part of the determination whether petitioner has satisfied his initial burden to

demonstrate prima facie eligibility, the trial court initially screens the petition for completeness. That initial review reasonably includes looking beyond facially sufficient allegations in the resentencing petition to consider "documents in the court file or otherwise part of the record of conviction that are readily ascertainable." (*Verdugo,* 44 Cal.App.5th at p. 329; see *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1138, review granted March 18, 2020, No. S260598 (*Lewis*); *Cornelius, supra,* 44 Cal.App.5th at pp. 57–58.) As our colleagues in *Lewis* explained, "sound policy" includes "[a]llowing the trial court to consider its file and the record of conviction." (*Lewis, supra*, at p. 1138.) It would be a significant misuse of judicial resources to require the court to appoint counsel and proceed with briefing and a hearing "'based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief.'" (*Ibid*.) Once and only if it determines basic eligibility requirements are satisfied, the trial court must appoint counsel (if requested), order briefing and, if the petitioner has made prima facie showing of entitlement to relief, issue an order to show cause and conduct a hearing to determine whether to vacate the murder conviction and resentence. (§ 1170.95, subds. (d)(1), (d)(3); *Verdugo, supra,* at pp. 328–329; *Lewis, supra,* 43 Cal.App.5th at p. 1140.)

Alvarez challenges the court's summary denial of his petition. The essence of his argument is that the trial court erred in looking beyond the face of his petition to determine whether he established

prima facie eligibility for relief under section 1170.95. A claim regarding procedures employed by the trial court in conducting its section 1170.95 review raises questions of law which we review de novo. (See *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 [questions of law are reviewed de novo]; see also *Verdugo, supra,* 44 Cal.App.5th at p. 328, fn. 8 [trial court's interpretation of § 1170.95 is reviewed de novo].)

The Court Did Not Err in Denying Alvarez's Resentencing Petition

Alvarez's contention that the trial court was required to accept his petition at face value under section 1170.95 is wrong. Alvarez's bare assertions (absent evidentiary support), were insufficient to make the requisite showing in the face of his conviction and other evidence considered by the court. (See *Lewis, supra*, 43 Cal.App.5th at p. 1139.) Indeed, Alvarez does not dispute that, on the merits and considering his record of conviction, he could still be convicted of felony murder after SB 1437.

As our colleagues explained in *Verdugo,* "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95." (*Verdugo, supra*, 44 Cal.App.5th at p. 323; § 1170.95, subds. (a) and (c).) Naturally, the trial court's consideration of the adequacy of a

resentencing petition requires it first to ascertain whether the petition is facially sufficient. (See § 1170.95, subd. (b)(2).) The analysis does not end there. Once it has performed an initial screening, the court will proceed to "review the petition and determine if the petitioner has made a prima facie showing that [he] falls within the provisions of [section 1170.95]." (§ 1170.95, subd. (c); *Verdugo, supra*, at p. 327.)

Here, the trial court reviewed the probation report and transcript from the hearing at which Alvarez entered his plea. Those records reveal Alvarez pled no contest to second degree murder and admitted personally using a firearm in the commission of a murder. Alvarez makes no argument, nor has he provided an offer of proof, let alone evidence, that the trial court's findings were based on an incorrect review of the record or incomplete evidence. Mere allegations refuted by the trial court's review of an undisputed record will not support a prima facie claim. (Cf. *In re Serrano* (1995) 10 Cal.4th 447, 456 [in habeas proceeding, appellate court may make credibility determination where court records directly contradict allegations of petition].) Alvarez's eligibility for relief under section 1170.95 cannot reasonably be inferred from bare allegations in his petition which the trial court found contradicted the court's records.

The amendments to sections 188 and 189 would not affect Alvarez's conviction, in light of the court's finding that the record established he was the actual killer (§ 1170.95, subd. (a)(3)), and there is no indication he was prosecuted under a felony-murder theory or a natural and probable consequences theory. Alvarez does not contest

this, and he has offered no evidence to support or suggest a contrary conclusion. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [judgments and orders are presumed correct, and all intendments and presumptions are indulged to support them on matters as to which the record is silent, i.e., error must be affirmatively shown].)

The allegations of Alvarez's resentencing petition were facially sufficient, but its factual representations are false. Alvarez was charged with first degree murder and personally using a firearm in the commission of that crime. It is established that Alvarez was the actual killer. The trial court properly screened and denied Alvarez's petition. Alvarez is not entitled to the protections of SB 1437, enacted to ensure that liability for murder is not imposed on a person who *did not* act with an intent to kill. (See *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) A petitioner is only eligible for relief under section 1170.95 only if he "*could not* be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a)(3), italics added.) The trial court committed no error by summarily denying the petition.

Finally, we reject Alvarez's contention that he was entitled to appointed counsel irrespective of the veracity of his allegations. Section 1170.95 mandates that counsel be appointed at the request of an

indigent petitioner only after the court determines the section 1170.95 petition states a prima facie claim for relief. (See *Lewis, supra*, 43 Cal.App.5th at p. 1140; *Verdugo, supra*, 44 Cal.App.5th at pp. 332–333; *Cornelius, supra*, 44 Cal.App.5th at p. 58 [rejecting claim that petitioner was entitled to appointed counsel where he was indisputably ineligible for relief under section 1170.95].)

DISPOSITION

The order denying the petition for resentencing pursuant to section 1170.95 is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.